BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DELMAR R. DIETRICH	)	
Claimant	)	
	)	
VS.	)	
	)	
BOEING COMPANY	)	
Respondent	)	Docket No. 1,014,496
	)	
AND	)	
	)	
INDEMNITY INS. CO. OF N. AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the January 22, 2004 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury arising out of and in the course of employment on August 26, 2003. He further found the claimant gave timely notice to his supervisor within ten days. Consequently, the ALJ designated an authorized treating physician to treat claimant's right knee.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment with the respondent. Respondent argues Dr. Larry T. Bumguardner's medical record does not contain a history of a work-related injury and, instead, indicates claimant denied any trauma or fall. Therefore, the respondent argues the claimant failed to meet his burden of proof that he suffered a work-related accident. Consequently, the respondent concludes the ALJ's Order should be reversed and claimant denied benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant, a 25-year employee of respondent, alleged an accident date of August 26, 2003, and each and every workday thereafter through September 26, 2003,

when he was laid off. The claimant alleged he injured his right knee on August 26, 2003, as he was getting down from a two-step stool and got his foot caught and fell.

The claimant thought his knee injury was not serious and would improve but when it did not get better he then reported his accident to his supervisor. But claimant further told his supervisor that he did not think he had suffered any lasting injury and did not request medical treatment. The claimant testified that as he continued working for respondent between August 26 and September 26, 2003, the pain in his right knee worsened. And claimant told his supervisor that his knee pain was worsening.

On September 19, 2003, claimant sought treatment with his personal physician, Dr. Larry T. Bumguardner. The history recorded by the doctor indicates an onset of pain three weeks before the office visit and that the claimant could not recall any specific trauma or fall. The claimant explained that he did not tell Dr. Bumguardner about the work-related incident because he thought the problem with his knee was minor and would not be a lasting condition.

It appears that after he was laid off the claimant then contacted respondent to advise them that he had an appointment scheduled with Dr. John P. Estivo. Claimant testified that he was told that the appointment was approved because the doctor was an approved health care provider for respondent's injured employees. Claimant gave Dr. Estivo a history of a work-related injury when he stepped off a stool, caught his ankle and twisted his right knee. That same history was provided to respondent's insurance carrier on October 19, 2003.

The Workers Compensation Act places the burden of proof upon claimant to establish his or her right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[3] Whether an accident arises out of and in

---

[1] K.S.A. 44-501(a) (Furse 2000); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 2003 Supp. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 439, 690 P.2d 1383 (1984).

[3] *Brobst v. Brighton Place North*, 24 Kan. App.2d 766, 771, 955 P.2d 1315 (1997).

the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The respondent argues claimant's failure to mention a work-related injury when he sought treatment with Dr. Bumguardner contradicts claimant's testimony that he suffered a specific injury at work. This argument overlooks both claimant's explanation of why he did not give a history of a work-related injury to the doctor and, more significantly, claimant's uncontradicted testimony that he told his supervisor about the accident a few days after it occurred. As the ALJ noted, claimant's testimony was uncontradicted that he told his supervisor about the accident within ten days. The supervisor did not testify.

In this case, there is a conflict between claimant's preliminary hearing testimony and the contemporaneous medical history claimant provided Dr. Bumguardner. The credibility of claimant is a significant factor in deciding this case. Herein, the ALJ's finding indicates he found the claimant a credible witness. When an ALJ renders a decision regarding the credibility of witnesses who testify in person before him, as in this case, the Board often gives some deference to that opinion.

Based upon the record compiled to date, the Board finds the claimant suffered an accidental injury arising out of and in the course of his employment. Accordingly, the ALJ's Order dated January 22, 2004, is affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[5]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated January 22, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2004.

_____
BOARD MEMBER

[4] *Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[5] K.S.A. 44-534a(a)(2) (Furse 2000).

c: James B. Zongker, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director